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No. 84-1258

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Washington Supreme Court

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BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Takings Clause requires a state supreme court to interpret state statutes and an unambiguous contract in conformity with the expectations of the bondholders?

2. Whether the Due Process Clause prohibits a state court from determining as matters of law the interpretation of the terms of an unambiguous contract and the availability of certain equitable remedies?

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BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

Respondent Public Utility District No. 1 of Snohomish County, Washington ("District"), respectfully prays that the Court deny the Petition for a Writ of Certiorari ("Petition") to the Washington Supreme Court submitted by Chemical Bank and the Washington Public Power Supply System ("Supply System").

OPINIONS BELOW

The District accepts the statement of the proceedings below at pages 1-2 of the Petition.

STATEMENT OF THE CASE

Introduction

This case arises out of the default of the Supply System on municipal bonds which it issued to finance the construction of two nuclear power plants known as Projects 4 and 5 ("Projects"). Chemical Bank, as trustee for the Projects' bondholders, brought a declaratory judgment action to determine the validity of the contractual obligations between the Supply System and all the participants in the Projects.

This action posed a unique question of statutory interpretation not previously passed upon by the Washington Supreme Court: Do the Washington statutes, which created and empowered municipal utilities, authorize them to execute resource acquisition contracts containing an unconditional payment obligation, but without ownership rights or their equivalent? After exhaustive briefing, two hearings and extended oral argument covering every conceivable theory, the Washington Supreme Court concluded that as a matter of state law, Washington municipal utilities were not so empowered, and that such a contract was substantively *ultra vires*. This decision was based upon state law, interpreted a contract which all parties conceded was clear and unambiguous, and was rendered in the normal course of a judicial proceeding.

Background

The utilities in the Pacific Northwest have traditionally relied upon electric energy produced by the region's hydroelectric generating resources, which is distributed primarily by the Bonneville Power Administration ("Bonneville"), a federal power marketing agency. All of the public utility participants in the Projects depended upon power purchased from Bonneville to meet some or all of their customers' needs.

During the 1960's, the region experienced a period of sustained and substantial growth. Power demand fore-

casts prepared by Bonneville and others predicted that by the early 1980's, the region's hydroelectric resources would be unable to meet projected needs. These predictions were underscored by the termination of Bonneville's power supply contracts with the region's investor owned utilities due to projected shortages. Public utilities were warned that unless resources were built, there would not be sufficient power to meet their customers' needs.

Under Bonneville's leadership, a plan was formulated to deal with this predicted power deficit. It called for the construction of a large number of thermal generating projects. Individual utilities were incapable of sponsoring these thermal projects, due to their high capital costs. The Supply System was identified as an organization which could finance and construct a number of large nuclear plants, since it had prior resource construction experience, and was a separate municipal corporation with the authority to issue bonds in its own name.

The Supply System initiated the regional construction program by executing "Net Billing Agreements" with public and investor owned utilities, and Bonneville for participation in Projects 1, 2 and 3. These agreements contained the net billing financing mechanism which provided the participating utility with a credit against their payment obligation equal to their Bonneville power bill. This arrangement provided a Bonneville guarantee for the payment of the bonds for these projects. The Supply System issued bonds in its own name and began construction of these plants.

While Projects 1, 2 and 3 were under construction, Bonneville informally advised its public utility customers that unless additional generating resources were built, it would invoke its contractual right to ration energy deliveries. This prompted regional utilities to search for an alternate financing mechanism for additional plants, since a Treasury ruling had made the net billing mechanism unavailable.

This search became urgent in June, 1976, when Bonneville issued its Notice of Insufficiency. This action gave Bonneville the contractual right to ration energy deliveries to its public utility customers. At this time, drafts of the Participants' Agreement ("Agreement") for the Projects were being circulated. With the Notice of Insufficiency, the Agreement was focused upon as the only readily available financing scheme for the two additional nuclear plants purportedly needed to avoid energy rationing and curtailment.

In this energy crisis climate, and at the urging of Bonneville, 88 of the region's public utilities executed the Agreement with the Supply System. The Agreement imposed an unconditional payment obligation in exchange for a conditional right to receive power. Upon execution of these Agreements, the Supply System issued bonds in its own name and commenced construction of the Projects.

This history of these Projects is a chronicle of the problems which beset the nuclear construction industry. Original cost estimates and construction schedules turned out to be grossly in error. Construction delays due to Nuclear Regulatory Commission ("NRC") regulation changes and labor problems, combined with double digit inflation and spiraling interest costs, caused the financing demands to increase dramatically. Further, the predicted energy deficit failed to appear, as demand for electricity decreased sharply due to a severe national recession, and substantial wholesale electric rate increases.[1]

These factors, which were beyond the control of the participants and the bondholders, resulted in a construction slow down of the Projects. Under these trying circumstances, rather than repudiating their obligations, 66 participants assumed additional financial burdens by lending the Supply System $60 million to preserve the Proj-

[1] Between 1979 and 1984, the wholesale electric rates of the public utility participants in the Projects increased by over 520%.

ects assets, and to retain the NRC licenses. Nevertheless, the demand for electricity remained low, making the need for the Projects questionable, and financing at reasonable rates became impossible to obtain. On January 22, 1982, the Supply System decided to terminate the Projects.

Under the Agreement, the first payment to the Supply System by the Participants was due one year after termination. Had the participants insisted on this contractual right, the lack of cash flow could have lead to an uncontrolled termination of the Projects. Once again, there was no wholesale repudiation by the participants of their obligations. Rather, 42 participants loaned an additional $7.8 million to the Supply System to cover the contractual gap between termination and the first payment required by the Agreement. These loans permitted the orderly termination of the Projects, avoiding a Supply System bankruptcy which would have imperiled the bonds of Projects 1, 2 and 3.[2]

Proceedings Below

In May, 1982, prior to the first participant payment required by the Agreement, Chemical Bank filed a declar-

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[2] To date, the Supply System has refused to repay the $67.8 million which was loaned to it by the various participants. To obtain payment from the Supply System, the participants have filed actions in various superior courts in Washington. See, for example, *Public Utility District No. 1 of Clallam County v. Washington Public Power Supply System*, King County Superior Court Cause No. 83-2-12412-3; *Public Utility District No. 1 of Snohomish County v. Washington Public Power Supply System*, Lewis County Superior Court Cause No. 83-2-00499-1; *Public Utility District No. 1 of Franklin County v. Washington Public Power Supply System*, Benton County Superior Court Cause No. 83-2-00715-9. These and other actions resulted in judgments in favor of the participants. The Supply System sought and obtained review of these judgments in a consolidated appeal to the Washington Supreme Court. *Public Utility District No. 1 of Lewis County, et al. v. Washington Public Power Supply System*, Cause No. 50238-2. Oral argument was heard March 20, 1985, and a final decision is pending.

atory judgment action in the Superior Court of King County, Washington, seeking a declaration that the Agreement was valid and binding, and that the unconditional payment obligation was enforceable against all participants. On July 20, 1982, Chemical Bank and the Supply System moved for summary judgment, alleging that there were no disputed material facts, that the Agreement was clear and unambiguous, and that as a matter of Washington law the participants had the statutory authority to execute a contract containing an unconditional payment obligation. The trial court ruled for Chemical Bank and the Supply System. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, Slip Op. at 3-4 (Super. Ct. King County, Nov. 16, 1982). Order on Motions for Summary Judgment (Appendix E at 3). Expedited appeal to the Washington Supreme Court was sought and obtained.

During the pendency of this matter, rather than repudiate their obligations, the participants requested and the court established an escrow account for the deposit of payments required by the Agreement. Over $27.7 million was deposited into this account during the litigation. In addition, numerous participants, representing over 96% of the Projects shares subscribed by Washington municipal corporations, raised their retail rates to ensure their ability to meet their obligations under the Agreement. These actions were taken in spite of the concerns over the possibility of a rate "death spiral",[3] and serious ratepayer opposition.[4]

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[3] The magnitude of the rate increases suffered by the public utility customers during this period led to serious scholarly consideration of whether these utilities were entering a "death spiral", an economic condition in which costs can never be covered because sales decrease faster than rates can be increased. See, "The Demand for Electricity and the Threat of Utility 'Death Spirals' in the Pacific Northwest," Arlon R. Tussing, presented to the Northwest Public Power Assoc., July 20, 1983.

[4] The District, one of the largest participants in the Projects, raised it retail electric rates on March 23, 1983, to generate reve-

The issue presented on appeal was whether state law permitted public utilities to execute a contract containing an unconditional payment obligation for generating facilities which they did not own, and from which they had only a conditional right to receive electricity. This was the first time this question of state law had been presented to any Washington appellate court. In a comprehensive decision, the Washington Supreme Court reviewed all of the pertinent statutes, and analyzed in detail the provisions of the Agreement. The court concluded that Washington municipal utilities are creatures of statute, possessing only those powers expressly granted to them or necessarily implied. *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 782, 666 P.2d 329 (1983) (Appendix B at 10) ("Chem Bank I"). The court noted that it had previously approved municipal utility participation in contracts containing an unconditional promise to pay, but only when the municipal utility had an actual ownership interest in the project. *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). The court recognized that legal control of a project could be tantamount to ownership, and that the amount of control exercised by the participants was established by the terms of the Agreement. *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14).

After careful review and analysis, the court concluded that as a matter of law the unambiguous terms of the Agreement did not vest the participants with an ownership interest in the plants, nor did it contractually grant them control sufficient to be considered tantamount to ownership. *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14). The court decided that under applicable Washington state law, absent ownership or control tantamount

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nues to meet its obligations under the Partiicpants Agreement. This action was immediately met by a lawsuit, filed by a group of the District's ratepayers, which sought to enjoin this rate increase. See, *Fair Use of Snohomish Energy, et al. v. Commissioners of Snohomish County PUD No. 1, et al.*, No. 83-2-01076-2 (Snohomish County Superior Court, March 23, 1983).

to ownership, municipal utilities lacked the statutory authority to contractually undertake an unconditional payment obligation. The court held the contract to be substantively *ultra vires*, and remanded the matter to the trial court. *Chem Bank I*, 99 Wn.2d at 799 (Appendix B at 37).

On remand, Chemical and the Supply System asserted numerous theories to sustain recovery, including restitution, equitable estoppel and some constitutional claims. Once again, there was extensive briefing and oral argument. Based upon abundant Washington precedent, the trial court concluded that as a matter of law equitable theories were not available to enforce a substantively *ultra vires* contract. *Chemical Bank v. WPPSS*, No. 82-2-06840-3 (Super Ct. King County, August 11, 1983) Order and Judgment. (Appendix D). To do so would strip the public of the protection provided by the *ultra vires* doctrine by holding them financially responsible for unauthorized actions, and render legislative limits on municipal authority functionally meaningless.

As to the remaining participants which were not Washington municipalities, the court considered the issues of mutual mistake and frustration of purpose. After careful consideration and analysis, the trial court concluded that the basic purpose, the very heart of the Agreement, had been frustrated because virtually none of its provisions could function properly with 70% of the participants statutorily barred from the Agreement. Further, after the declaration of default and acceleration, Chemical Bank could seize the Projects' assets. The trial court decided that under these drastically altered circumstances, the entire purpose of the Agreement had been frustrated, and that as a matter of law the remaining participants should be released. *Chemical Bank v. WPPSS*, No. 82-2-06840-3 (Super. Ct. King County, August 11, 1983) Order and Judgment (Appendix D).

On their second appeal to the Washington Supreme Court, Chemical Bank and the Supply System raised and briefed a variety of arguments, including restitution, equitable estoppel, unjust enrichment and a constitutional theory drawing on the Due Process, Contract and Takings Clauses. Once again, each of these issues was analyzed in detail. The Washington Supreme Court concurred with the trial court that Washington law prohibited reliance on equitable estoppel, since such a ruling would functionally eliminate the *ultra vires* doctrine from municipal law. The court also concluded that restitution was inapplicable as a matter of law, because Washington precedent prohibits restitution against a municipal corporation where the contract is substantively, as opposed to procedurally, *ultra vires*. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 910, 691 P.2d 524, 544 (1984). (Appendix A at 37) ("Chem Bank II"). In this case, since the municipal utilities lacked the authority they sought to exercise, the contract was substantively *ultra vires*, rendering restitution unavailable.

The court also addressed the constitutional allegations, which amounted to the assertion that the federal constitution required the Washington Supreme Court to interpret state law in a manner consistent with bondholder expectations. The court concluded that the Contract Clause was not applicable, because no contract came into being. *Chem Bank II*, 102 Wn.2d at 912-13 (Appendix A at 39). The court held that the Due Process Clause cannot be interpreted to prohibit state courts from declaring the law, nor from declaring contracts void when they exceed it. *Id.* As to the Takings Clause, the court noted that the case primarily relied upon by Chemical Bank to support its Takings Clause claim dealt with the use of real property, not a judicial ruling on the nature of state law. *Id.* Chemical Bank and the Supply System cited no case to support the proposition that the judicial resolution of a state law question of first impression violates the Takings Clause merely because it is contrary

to the expectations of one of the litigants. The Court affirmed the decision of the trial court. *Chem Bank II*, 102 Wn.2d at 913 (Appendix A at 39).

RELATED LITIGATION

Chemical Bank, the bondholders, and various insurance carriers are actively pursuing multiple remedies in state and federal litigation. In the United States District Court for the Western District of Washington, three separate actions have been filed: *Chemical Bank v. Public Utility District No. 1 of Benton County, Washington, et al.*, C83-1080 (1983); *In re Washington Public Power Supply System Securities Litigation*, MDL-551 (1983); and *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, Washington, et al.*, C84-690 (1984). These actions have been consolidated, and they allege violations of federal and state securities laws, negligence, negligent misrepresentations, and common law fraud. In addition to the participants in the Projects, the Supply System, and its Board of Directors, these suits also name as defendants the experts upon whom the bondholders allegedly relied.[5] The *Chemical Bank* action is on behalf of all current bondholders, while MDL-551 is a class action on behalf of all individuals, investment and insurance companies which purchased bonds of the Projects from 1977 to January 22, 1982. These matters are well into the discovery process, and a trial date has been scheduled.

Bondholders are also pursuing a variety of remedies in state court actions, including *Haberman, et al., v. Washing-*

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[5] These experts include Blyth Eastman (the Supply System's financial adviser); Merrill, Lynch, Pierce, Fenner and Smith, Salomon Brothers, Smith Barney, and Prudential-Bache (lead underwriters for Project 4 and 5 bond issues); R. W. Beck (consulting engineer); Ebasco Services and United Engineers & Constructors (architects-engineers); Wood & Dawson and Houghton, Cluck, Coughlin & Riley (Supply System bond counsel and special counsel, respectively); and the Bonneville Power Administration.

ton Public Power Supply System, et al., No. 84-2-06452-8 (1984) (Superior Court for King County, Washington) and *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (1984) (Superior Court for King County, Washington). These suits name many of the same defendants as the federal actions, and also Ernst & Whinney, the Supply System's auditor, and the State of Washington. They rely on state securities laws, misrepresentation, negligence and various equitable theories.

These federal and state actions provide Chemical Bank and the bondholders with other forums in which to litigate their alleged negligence, reliance and other claims.

REASONS FOR DENYING THE WRIT

Review will not be granted for judgments of state supreme courts which rest on adequate non-federal grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1954). To afford a basis for review, a substantial federal question must be presented. *Dixon v. Duffy*, 342 U.S. 33 (1951). No substantial federal question is presented where a state court decision can be interpreted as construing a local contract under local law. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956). These principles should be applied in the instant case to deny the requested Writ.

This case presents nothing more novel than a state supreme court declaring the meaning of a state statute, and interpreting the unambiguous terms of a contract between the participants and the Supply System. No abrupt change to well-established precedent took place, only the judicious answer to a question of first impression concerning the statutory authority of municipal corporations.

No substantial federal question has been raised in this matter upon which certiorari can be granted. Petitioners have attempted to manufacture a constitutional claim by alleging a contract repudiation where none occurred,

and by asserting that a state supreme court ruling violates their constitutional rights because it is contrary to their expectations. In essence, Petitioners ask this Court to review and overturn a state supreme court ruling interpreting state law in which no federal question arose. They seek the wrong remedy from the wrong court. Petitioners' remedy lies in state and federal court litigation, rather than attempting to convert their alleged reliance, negligence, and other claims into a substantial federal question.

I. This Decision Does Not Present a Takings Clause Question

The Takings Clause (U.S. Const. Amend. V, cl. 4) is applicable to the states through the operation of the Due Process Clause (U.S. Const. Amend. XIV, § 1, cl. 3). *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The Takings Clause is not read literally to compel compensation for every government action which infringes on a property interest, but depends upon the facts and circumstances of each particular case. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Although the Court has developed formulas and factors which can be used in a variety of situations, there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). Resolution of Takings Clause questions ". . . ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). To raise a Takings Clause question, something more than the incidental injury to a property interest resulting from the exercise of lawful government authority must be demonstrated. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561 (1906). The complaining party must establish a constitutionally recognized property interest, and demonstrate that it has been taken or appropriated for government

use without compensation. Neither criteria are satisfied in this case.

A. *No Constitutionally Recognized Property Interest Is Involved*

The Court has established that contracts can constitute "property" under the Takings Clause. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897). However, ". . . not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them . . ." are entitled to constitutional protection. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). The Court has been quick to find a constitutionally cognizable property interest when the government has appropriated real property to its own use. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In contrast, the Court has been understandably reluctant to find a property interest in anticipated profits or future earnings.

> . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. . . . Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus v. Allard, 444 U.S. 51, 66 (1979).

In this case, no "property right" cognizable under the Takings Clause was appropriated for government use. As the Washington Supreme Court noted, when a municipal corporation ". . . acts beyond its specific statutory authority, no contract obligation is created." *Chem Bank II*, 102 Wn.2d at 912 (Appendix A at 39). The *ultra vires* Agreement vested no property right in the Petitioners.

Further, the ability of the bondholders to enforce an unconditional payment obligation against municipal corporations, by virtue of the *ultra vires* Agreement to which they were not parties, is not a right that had ". . . the law back of them." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). As the Washington Supreme Court noted, no Washington decision had ever ". . . found authority for a project in which the participants did not have an ownership interest." *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). At best, Petitioners had an "interest in anticipated gains" based upon their expectation of the participants' statutory authority. As the Washington Supreme Court observed, ". . . the record indicates that from the outset of the projects there were questions about the statutory authority of some 16 participants . . . ." *Chem Bank I*, 99 Wn.2d at 796 (Appendix B at 23).

As this Court has repeatedly recognized, ". . . a mere unilateral expectation . . . is not a property interest entitled to protection." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). Petitioners' unilateral expectation that Washington law authorized the participants to execute an agreement containing an unconditional payment obligation without any ownership interest is not a property interest cognizable under the Taking Clause.

B. *No Taking For Government Use Has Occurred*

To posit a substantial question under the Takings Clause, Petitioners must demonstrate that a "taking" of their property interest has occurred. Under the Takings Clause, every ". . . reduction in the value of property is not necessarily equated with a taking." *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Even the total destruction of the value of the property interest does not automatically compel the conclusion that a compensable tak-

ing has occurred. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Diminution in value has never been the sole litmus test. A more sophisticated analysis has been employed to ascertain whether there was a direct appropriation for government use, or merely a consequential injury due to the exercise of lawful power. It has long been recognized that ". . . for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1922).

In this case, there was no direct appropriation of a property interest for government use. There has been no expropriation of real property, (*Hughes v. Washington*, 389 U.S. 290 (1967)); no intrusion by governmental use, (*Kaiser-Aetna v. United States*, 444 U.S. 164 (1919)); no regulation so onerous as to constitute a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). All that has occurred is the lawful exercise by a state court of its power and duty to interpret state law at the request of the Petitioners. As this Court has recognized, the exercise of such authority does not constitute a "taking" merely because a contract upon which parties may have relied is declared null and void. *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U.S. 320 (1901). Any damage which the Petitioners may have suffered is consequential to the exercise of lawful judicial authority, and does not amount to a taking for government use under the Fifth Amendment. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1922).

C. *The Takings Clause Does Not Require State Law To Conform To The Litigants' Expectations*

In a number of cases where a property interest has been injured by government regulatory or legislative ac-

tion, the Court has looked at three indicia to determine if a compensable taking has occurred: the character of the governmental action; the economic impact of the action; and the reasonableness of the investment-backed expectation. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Although the absence of legislative or regulatory action in the instant matter makes the use of these criteria inappropriate, nevertheless, their application to the facts of this case leads to the conclusion that no compensable taking has occurred.

Regarding the character of the government action, "a taking may more readily be found when the interference with property can be characterized as a physical invasion by government. . ." *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982). In this matter, there was a judicial interpretation of state law which declared a contract null and void. No property was invaded for government use; no pre-existing rights were appropriated. Rather, after the normal course of judicial process, the Washington Supreme Court answered a state law question of first impression. No decision of this Court has been cited for the proposition that the discharge by a state supreme court of its judicial function of interpreting state law constitutes a compensable taking under the Fifth Amendment. To find a compensable taking each time a state court interprets state law in a manner that impinges on a contract would ". . . effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

As for the economic impact of the government action in this case, to date it cannot be stated with finality that the Petitioners have suffered any economic impact. Although they have lost one "strand" of their bundle of property rights, the ability to rely on payment under the terms of the *ultra vires* Agreement, they still have numerous alternative forums and remedies through which

they can, and presently are attempting to, obtain return of their investment. Until these remedies are exhausted, it cannot be stated with certainty that the Petitioners have suffered any economic impact.[6]

Finally, the Petitioners' investment-backed expectation that all 88 participants had legal authority to make an unconditional promise to pay was not reasonable. As the Washington Supreme Court noted, ". . . from the outset of the projects there were questions about the statutory authority of some 16 participants . . ." to execute the Agreement. *Chem Bank I*, 99 Wn.2d at 796 (Appendix B at 23). In every Official Statement of each Bond Issue for the Projects, the Supply System's bond counsel would only warrant that 72 of the 88 participants had the legal authority to execute the Agreement. Petitioners were thus on notice that there were serious questions regarding the legal authority of some of the participants. In the face of this information, the Petitioners cannot now claim a reasonable investment-backed expectation that all participants possessed the requisite legal authority.

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[6] Petitioners and certain *amici* have suggested that this decision by the Washington Supreme Court has thrown the municipal bond market into chaos and disarray, and that only intervention by this Court can avert calamity. See, Petition for Writ of Certiorari, p. 9; Brief of *Amicus* Solomon Brothers, *et al.*, p. 3. These assertions are flatly contradicted by the facts. Since the Washington Supreme Court issued its decision, Washington public utilities have either issued or participated in the issuance of municipal bonds worth in excess of $487 million. In addition, two of the largest public utilities in Washington have subsequently issued or participated in the issuance of substantial bond offerings to finance the construction of generating resources. The District, the largest participant in the Projects, sold bonds worth $241.6 million to finance the Sultan Hydroelectric Project. The City of Seattle, which is a member of the Supply System, has participated in the issuance of bonds worth $104 million to finance the Lucky Peak Project. The sale of bond issues of this magnitude, subsequent to the decision in this case, hardly depicts a municipal bond market in the throes of chaos.

Possession of this type of knowledge ". . . disposes of the taking question . . ." *Ruckelshaus v. Monsanto Co.*, 81 L. Ed. 2d 815 (1984).

In essence, Petitioners argue that any judicial decision which is contrary to the "unilateral expectation" of an investor constitutes a "taking" under the Fifth Amendment. Under Petitioners' approach, any litigant who could allege that their investment expectation was upset by a judicial decision, even in the absence of any supporting precedent, would have an actionable claim under the Takings Clause. Not only would such an approach severely limit the ability of the state judiciary to interpret state law, but it also would entitle every disgruntled contract litigant to a Writ of Certiorari to this Court.

The Takings Clause has never stood for the proposition that the ability of the judiciary to declare the law is limited by the expectations of the parties, be they investors or otherwise. ". . . [T]he construction of a statute does not take a party's property without due process simply because it takes him by surprise, . . ." *O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26 (1916). Petitioners ask this Court to hold that they have a vested property interest in the law as they expected it to be, and to reverse the state court decision because it conflicts with their expectations. Such an approach would be unprecedented, and require this Court to step well beyond its jurisdiction.

> This court is without authority to review and revise the construction affixed to a state statute as to a state matter by a court of last resort of the state.

Terrace v. Thompson, 263 U.S. 197, 224 (1923).

This Court has already considered and rejected virtually identical Takings Clause arguments previously asserted by these same Petitioners as a basis for the exercise of this Court's jurisdiction. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I), *cert.*

denied, 105 S. Ct. 219 (1984). The same result should obtain this case.

D. *The Decision Below Is Consistent With Established Precedent*

Petitioners have attempted to manufacture a conflict between the decision in this case and prior holdings of this Court by relying upon selected quotes from concurring opinions and cases which are clearly distinguishable. The cases relied upon by Petitioners provide no basis for issuing a Writ of Certiorari.

Petitioners place primary reliance on *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). This case involved a state law which required court clerks to invest money paid into the court for interpleader actions, and to retain any interest income. In essence, this statute appropriated to the county the use of private funds during the litigation. In sustaining this statute, the court below overruled a long established general rule that interest on interpleaded funds is allocated to the ultimate owners.

On appeal, this decision was reversed. In a narrow holding limited to the facts of the case, this Court ruled that a statute which appropriated to the county the use of private funds as the price for gaining access to the judicial system offended the Fifth Amendment. The Court analogized the operation of this statute to the appropriation of real property for government use found objectionable in *United States v. Causby*, 328 U.S. 256 (1946).

The case at bar presents a wholely different situation. Here there is no state statute requiring litigants to contribute their interest earnings to the state in order to seek judicial redress. Nor does it involve a state court overturning a long established and generally accepted common law rule. Rather, it involves a state court interpreting for the first time a state law in order to answer a question never before posed to the Washington courts.

There has been no "assumption of ownership" by legislative action which the Court found offensive in the *Webb* case.

The other case relied upon by the Petitioners lends even less support to their position. *Hughes v. Washington*, 389 U.S. 290 (1967) presented this Court with the question of whether state or federal law controlled title to accretions. The Court held that title to accretions along navigable waterways is controlled by federal rather than state law. The majority decision found no Takings Clause issue. Because of this, Petitioners are forced to rely upon language extracted from a concurring opinion to the effect that a sudden change in the well-established common law by a state court may constitute a "taking."

Even assuming, *arguendo*, that the selected quote from a concurring opinion correctly states the law, it has no application to the case at bar. In contrast to the *Hughes* case, the decision in this matter does not deprive anyone of an interest in real property, nor does it reverse a long established common law rule governing real property interests. At most, the decision in this case interpreted a state law provision in order to provide an answer to a question which had never before been posed. Neither the *Hughes* case, nor any other decision of this Court, stands for the proposition that the Takings Clause prohibits state courts from interpreting state statutes to answer questions of first impression.

II. This Case Does Not Present A Contract Clause Question

Amicus Public Securities Association assert that the decision in this case abridged contractual rights, in violation of the Contract Clause. (U.S. Const. Art. I. § 10, cl. 1). Brief in Support of Petition, pp. 16-19. *Amicus* argues that the same considerations underpin both the Due Process and Contract Clauses, and both should be applied to this case. This argument is devoid of merit.

The decisions of this Court have established beyond argument that the Contract Clause, by its plain language, ". . . is directed only against impairment by legislation, and not by judgments of courts." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 448 (1924). It has been made abundantly clear that ". . . the constitution affords no protection as against an impairment [of contract] by judicial decision." *Columbia Railway Gas & E. Co. v. South Carolina*, 261 U.S. 236, 244 (1923). Were this not so, the state judiciary could be rendered impotent by the mere expedient of executing a contract.

Contrary to the assertions of *amicus*, this rule of law is not subject to exception when the state's own contract is involved. As this court made clear in *United States Trust v. New Jersey*, 431 U.S. 1 (1977), strict scrutiny will be employed when a state abrogates its own contract by legislation. However, no level of scrutiny under the Contract Clause, strict or otherwise, will be applied to judicial decisions which impair contractual rights. This case presents no Contract Clause question.

III. No Substantial Procedural Due Process Question Is Presented

The Due Process Clause requires that litigants be afforded notice and an opportunity to be heard at a meaningful time and place. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). The Due Process Clause neither guarantees that the law will be interpreted in conformance with the Petitioners' expectations, nor that a particular result will be assured. The Due Process Clause requires only that the parties be given a fair chance to state their case. *Grannis v. Ordean*, 234 U.S. 385 (1914).

The record of this case amply demonstrates that Petitioners were given numerous opportunities to brief and argue every conceivable theory before the trial court and the Washington Supreme Court. Further, the record es-

tablishes that Petitioners took advantage of every opportunity presented to vigorously press their case. The requirements of the Due Process Clause were more than satisfied.

A. *The Issue Of The Participants' Control Of The Projects Was Properly Decided As A Matter Of Law*

It is well settled that due process is a flexible concept adopted to the circumstances of each individual case. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482-83 (1982). The Due Process Clause requires an opportunity for ". . . a hearing appropriate to the nature of the case". *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The type of hearing appropriate to a particular case is largely dependent on the nature of the issues involved. An evidentiary hearing is not required in a case involving exclusively legal issues. *Codd v. Velger*, 429 U.S. 624 (1977) (*per curiam*); J. Nowak, *Constitutional Law*, Ch. 15, p. 556 (2nd Ed. 1983).

> Due process is not an unvarying standard; what process is due always depends upon the interest effected. The only issues at the hearing were ones of law. . . *In such circumstances due process does not require a full evidentiary hearing but only adequate opportunity for argument.* . . . (Emphasis added.)

Conn. St. Dept. of Public Works v. Dept. of Health, Education & Welfare, 448 F.2d 209, 212 (2nd Cir. 1971).

In this case, the Washington Supreme Court noted that it had ". . . never found authority for a project in which the participants did not have an ownership interest." *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). However, the court recognized that control of the Projects could be equivalent to ownership. In order to give every conceivable benefit of the doubt to the Peti-

tioners, the court examined the Agreement ". . . to determine whether the participants retained sufficient interest." *Chem Bank I*, 99 Wn.26 at 787 (Appendix B at 14). The court reviewed the operation of the unambiguous terms of the Agreement, and concluded as a matter of law that it did not grant the participants control of the Projects equivalent to ownership. *Id.*

This interpretation of the contractual language involved a question of law, and did not raise any factual issues. As the Washington Supreme Court noted, under Washington law, this issue was properly resolved as a matter of law. *Chem Bank II*, 102 Wn.2d at 894 (Appendix A at 20), citing *Kelly v. Aetna Cas. & Surety Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983). Accordingly, the Washington Supreme Court's consideration of this issue on at least two separate occasions afforded the Petitioners a hearing appropriate to the nature of the issue and fully satisfied the demands of due process.[7]

The Petitioners attempt to circumvent this rule of law by arguing that since several participants were Supply System members, a factual question was raised requiring an evidentiary hearing.[8] This argument seriously misconstrues the Washington Supreme Court's decision on the control issue.

The question posed to the Washington Supreme Court was whether the Agreement granted the participants ". . . sufficient control over the project to constitute the equivalent of ownership." *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14). To determine the statutory

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[7] The issue of the control retained by the participants over the Projects under the Participants' Agreement was addressed in both decisions of the court, as well as in the Petitioner's unsuccessful motion for reconsideration after the June, 1983, decision.

[8] This is in direct conflict to the position previously taken by the Petitioners. In the trial court proceedings, the Petitioners moved for summary judgment on the basis that all issues could be resolved on purely legal grounds.

validity of this contract, the court properly focused its attention on the terms and conditions of the Agreement. As the court recognized, it was only by analyzing the terms of the Agreement that it could determine the degree of control, if any, exercised by the utilities in their role as participants.

There are a number of other pertinent factors which support the Washington Supreme Court's focus on the Agreement in resolving the control issue. The Court's purpose in analyzing this issue was to determine whether the participants had statutory authority when they executed the Agreement in 1976. Some of the participants did not become Supply System members until after the Agreements were executed, and the majority of the participants never became Supply System members. Since it is the utility's authority at the time the Agreement was signed which was critical, the court had to focus on the authority each utility possessed as a participant under the Agreement at the time of execution, regardless of any collateral status as a Supply System member.

Further, any control which the participants may have exercised by virtue of their Supply System membership was too transitory to be considered equivalent to an ownership interest. The rights of Supply System members were subject to legislative modification at any time.[9] The fact that control incident to Supply System membership could be modified or eradicated at any time rendered it too ephemeral to constitute the equivalent of an ownership interest.

In view of the foregoing, the Washington Supreme Court properly limited its focus to the actual language of the Agreement in resolving the control issue. Accordingly, resolution of the issue as a matter of law in no way deprived the Petitioners of due process.

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[9] The Washington Legislature has on two occasions modified the rights of Supply System members. 1981 Wash. Laws, ch. 3, § 2 (1st Ex. Sess.); 1983 Wash. Laws, ch. 3, § 3 (1st Ex. Sess.).

B. *The Availability Of Equitable Remedies Was Properly Decided As A Question Of Law*

As discussed above, the Due Process Clause does not require an evidentiary hearing for the adjudication of issues of law. *Codd v. Velger*, 429 U.S. 624 (1977) (*per curiam*). Accordingly, since the Washington Supreme Court's ruling on the inapplicability of equitable remedies was supportable on entirely legal grounds, deciding this issue as a matter of law did not impinge upon Petitioner's due process rights.

The Washington Supreme Court's determination that the application of equitable remedies was precluded as a matter of law because the execution of the Agreement was substantively *ultra vires* was based on long established Washington precedent. Estoppel and other equitable relief are not available against a governmental entity for an *ultra vires* act which is void because it is done wholly without legal authorization. *Finch v. Matthews*; 74 Wn.2d 161, 443 P.2d 833 (1968); *Arbogast v. West Port*, 18 Wn. App. 4, 567 P.2d 244 (1977). Where a municipality lacks substantive authority to enter into a contract, the contract is absolutely null and void, and there can be no recovery on any equitable theory against the municipality. *See, e.g., Osborne, Tremper & Co. v. King County*, 76 Wash. 277, 285-86, 136 P. 138, 141 (1913); *State ex rel. Craig v. Newport*, 70 Wash. 286, 292-94, 126 P. 637, 640 (1912). The principle is well settled that one cannot do indirectly what cannot be done directly, and when there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. *See, State v. Pullman*, 23 Wash. 583, 63 P. 265 (1900).

The court concluded that because the Washington municipal utilities lacked the statutory authority to execute the Agreement, it was substantively *ultra vires*, and as a matter of state law "the doctrine of substantively

ultra vires activity thus precludes recovery." *Chem Bank II*, 102 Wn.2d at 911 (Appendix A at 38). Because equitable remedies were precluded as a matter of law, there were no factual issues relevant to the availability of equitable remedies. Consequently, the issue was properly resolved by the Washington Supreme Court as a matter of law.

The Petitioners attempt to bolster their Due Process claim by alleging that the Washington Supreme Court's decision on the inapplicability of equitable remedies was based wholly on their failure to seek a declaratory judgment on the participants' legal authority. This line of reasoning is without merit, and seriously misinterprets the decision in this case.

As the Washington Supreme Court made abundantly clear, the denial of equitable remedies was based on the finding that the Washington municipal utilities lacked the statutory authority to execute the Agreement, and as a matter of state law that act was substantively *ultra vires*, rendering the Agreement void in all respects. It is well settled that the Supreme Court will not review judgments of state courts which rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1954); *Camp v. Board of Pub. Inst.*, 368 U.S. 278 (1961). Here, the Washington Supreme Court's denial of equitable relief rests firmly on state law, the application of the *ultra vires* doctrine. The court's aside regarding a possible declaratory judgment action was not crucial to the ultimate holding on this issue, and provides no legitimate basis for granting Petitioners' request for review.

Furthermore, the existence of an indisputable basis for denying equitable relief under the *ultra vires* doctrine demonstrates that the court's aside regarding a possible bondholder declaratory judgment action can amount to no more than harmless error. Such harmless

error would have to be disregarded by the Supreme Court if it were actually to rule on Petitioners' Writ of Certiorari. 28 U.S.C. § 2111. The court's aside provides no basis for granting review, nor does it present a substantial federal question even if it is assumed, *arguendo*, that the court was in error. As this Court has stated:

> We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 721, *reh'g denied*, 335 U.S. 837 (1948).

IV. The Due Process Clause Does Not Require Certain Justices' To Disqualify Themselves

Petitioners contend that they were denied an impartial tribunal because two of the Washington Supreme Court Justices were customers of one or more of the participants. This contention is unfounded. A judge's incidental, remote or contingent pecuniary interest in the subject matter of an action, such as that alleged by Petitioners, is insufficient to mandate disqualification. *See, Nueces County Drainage & Conservation District No. 2 v. Bevly*, 519 S.W.2d 938, 951-52 (Tex. 1975). Indeed, the federal courts have specifically recognized that where a utility is a party, the ratepayer status of a judge is not disqualifying. *See, e.g., New Orleans Public Services v. United Gas Pipe Line*, 719 F.2d 733, 735 (5th Cir. 1983); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (1980). These legal authorities are dispositive, and establish that the ratepayer status of the two Washington Supreme Court Justices did not mandate their disqualification or intrude upon Petitioners' due process right to an impartial tribunal.

CONCLUSION

Petitioners have attempted to manufacture a constitutional claim where none exists. This is a case of a state court interpreting state law and the unambiguous terms of a contract. Although the question presented is one of first impression, the fact that the answer was contrary to the expectations of the Petitioners does not create a substantial federal question. If Petitioners have suffered harm by this decision, their remedy lies in pursuing negligence and reliance claims in state and federal courts, which they are currently doing with great vigor. The decision below was based upon adequate state law grounds, and no substantial federal questions have been presented to warrant the exercise of this Court's jurisdiction. The Petition for a Writ of Certiorari to the Washington Supreme Court should be denied.

Respectfully submitted this 5th day of April, 1985.

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